DOCKET FILE COPY ORIGINAL

RECEIVED

AUG 2 3 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992 Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations and Anti-Trafficking Provisions	MM Docket No. 92-264

To: The Commission

COMMENTS OF THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.

Daniel L. Brenner
Loretta P. Polk
NATIONAL CABLE TELEVISION ASSOCIATION, INC.
1724 Massachusetts Avenue, N.W.
Washington, D.C. 20036
202/775-3664

Seth A. Davidson
FLEISCHMAN AND WALSH
1400 Sixteenth Street, N.W.
Suite 600
Washington, D.C. 20036
202/939-7900

August 23, 1993

TABLE OF CONTENTS

SUMMARY

In directing the Commission to adopt limits on horizontal concentration and vertical integration in the cable industry, Congress did not intend to work a radical transformation in current market structure. Rather, Congress was quite clear in its admonition that the Commission must "strike the proper balance" among a variety of competing policy objectives in establishing ownership limits.

In the Further Notice, the Commission has acknowledged its obligation to consider and protect the beneficial efficiencies provided by horizontal and vertical concentration. The Commission also has recognized that the 1992 Cable Act contains a number of provisions that directly address anticompetitive practices attributable to undue concentrations of market power. Nonetheless, in several of its proposals and tentative conclusions, the Commission has failed to give appropriate weight to these considerations. Consequently, the Commission should revisit these determinations prior to adopting final rules.

Specifically, with respect to the adoption of horizontal ownership limits, the Commission's decision not to adopt regional limits is sound as a matter of both law and policy and should be reaffirmed. On the other hand, the Commission's proposed 25 percent cap is unnecessarily restrictive and must be reconsidered; a limit in the 30 to 40 percent range is far more appropriate given the record in this proceeding. The Commission also should adopt an attribution standard based on actual or working control, rather than the unduly stringent broadcast attribution test. Lastly, the Commission should consider waiver requests, particularly in cases involving previously unserved areas; the Commission also

should rely on publicly available data to monitor compliance with the subscriber limits rather than impose an unnecessarily burdensome certification process.

With respect to the adoption of channel occupancy limits, the Commission has correctly determined that such limits should be applied to a cable operator's carriage of video programmers in which that particular operator has an ownership interest. NCTA also agrees with the Commission's decision to include PEG, leased access, and broadcast channels in the channel occupancy limit calculation. However, the Commission has seriously erred in suggesting that the channel occupancy limits also encompass non-video programming and in indicating that there is not a present need for a ceiling on the capacity to which the limits apply. Furthermore, while the Commission has properly determined that the channel occupancy limit should not apply to local origination channels and regional networks, the decision not to exempt pay-per-view services should be revisited, as should the proposed adoption of the unduly stringent broadcast attribution criteria. Indeed, whether the proposed 40 percent limitation is appropriate is dependent upon whether the Commission modifies the applicable attribution standard and caps the number (and types) of channels to which the channel occupancy limits apply. Finally, the Commission has correctly decided to retain jurisdiction over the enforcement of channel occupancy limits; however, one of the prime benefits of that decision -- reduction of administrative burdens -- will be lost if the Commission does not adopt a complaint-driven enforcement process.

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

RECEIVED

AUG 2 3 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992 Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations and Anti-Trafficking Provisions	)	MM Docket No. 92-264

To: The Commission

COMMENTS OF THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.

On July 24, 1993, the Commission released a Further Notice of Proposed Rule Making ("Further Notice") in the above-captioned proceeding seeking additional comment on proposals to implement the provisions of Section 11 of the 1992 Cable Act relating to the imposition of restrictions on horizontal ownership (i.e., subscriber limits) and vertical integration (i.e., channel occupancy limits) in the cable television industry.[1] The National

[1]58 Fed. Reg. 42047 (Aug. 6, 1993).

Section 11 adds a new subsection (f) to Section 613 of the Communications Act of 1934, as amended, 47 U.S.C. § 533(f). Section 11 also instructs the Commission to consider the appropriateness of limits on the degree to which multichannel video distributors may engage in the creation or production of video programming. As the Further Notice notes, the record is devoid of any evidence supporting the adoption of such limits. Further Notice at ¶ 1 n.4.

Cable Television Association, Inc. ("NCTA"), by its attorneys, hereby submits its comments in response to the Commission's Further Notice.

INTRODUCTION

During the initial phase of this proceeding, NCTA repeatedly urged the Commission to proceed with caution in imposing limits on horizontal and vertical ownership in the cable industry. Citing the Commission's own findings in the 1990 Cable Report, as well as the legislative history of the 1992 Cable Act, NCTA noted that horizontal and vertical growth, and the efficiencies afforded thereby, had provided (and are likely to continue to provide) substantial benefits to the public and that Congress intended the structural limits required by Section 11(c) of the 1992 Cable Act to serve as a safeguard against any radical transformation in existing market patterns, not as a means of achieving such a transformation.

In the Further Notice, the Commission has, in fact, acknowledged its statutory obligation to take into account not only the potential adverse effects of increased horizontal and vertical integration in the cable industry, but also the benefits. In particular, the Commission has recognized that Section 11(c) is only one of several provisions in the 1992 Cable Act addressing concerns about the potential adverse impact of horizontal and vertical concentration on the development of competition and diversity in the video marketplace and that it is the Act's other provisions -- such as those governing program access, leased access, must carry, and carriage agreements -- that are the principal tools for ensuring that diversity and competition are protected. Nonetheless, in several instances, the Commission has reached tentative conclusions or put forward proposals that are unnecessarily broad and will unduly restrict continued beneficial investment in the cable industry. As discussed more fully below, the final rules adopted in this proceeding should be tailored to avoid such unwarranted intrusions into cable's ongoing evolution as an integral part of the nation's telecommunications network.

DISCUSSION

I. SUBSCRIBER LIMITS

A. Applicable Market.

In its Initial Notice of Proposed Rule Making ("Notice") in this proceeding, the Commission asked for comment on whether it should adopt regional as well as national subscriber limits.[2] In the Further Notice, the Commission has tentatively concluded that the horizontal ownership restrictions should be applied solely on a national basis.[3] The Commission recognizes that such limits would be consistent with the pattern of national, rather than regional, distribution of cable programming. And it is cognizant that regional restrictions would interfere with the marketplace efficiencies and other benefits associated with regional concentration. Nevertheless, the Commission seeks assurances that national subscriber limits will sufficiently implement the objectives of the 1992 Cable Act.

---

[2]In the Matter of Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations and Anti-Trafficking Provisions, Notice of Proposed Rule Making and Notice Of Inquiry, MM Docket No. 92-264, 8 FCC 2d 210, 216-17 (1992).

[3]Further Notice at ¶ 137.

In addressing horizontal ownership, Congress was concerned with "national concentration in the cable industry,"[4] that is, the potential of large MSOs to exercise their market power nationwide in a manner that would preclude entry of new programming services or otherwise restrict diversity and competition. As set forth in the statute, the Commission's objective, inter alia, is to ensure that no entity attains such an audience reach that it could "unfairly impede the flow of video programming" to the consumer.[5] Since most cable networks distribute their programming nationally via satellite and, consequently, sell their programming to cable operators and other video providers in a national market, adopting national subscriber limits serves this important objective.

The adoption of regional subscriber limits would, however, disserve the Act's objectives. There is no statutory basis, express or implied, for establishing such limits. And without a legislative directive, or at least some evidence of congressional concern about regional concentration, the Commission lacks the legal compass for such regulation. Moreover, regional subscriber limits would contravene another policy objective, i.e., ensuring that "any efficiencies and other benefits that might be gained through increased ownership or control" are taken into account.[6] As the Commission and numerous initial commenters have recognized, regional limits may sacrifice many of the economies of scale

---

[4]S. Rep. No. 92, 102d Cong., 1st Sess. 34 (1991) ("Senate Report"). See also 1992 Cable Act Section 2(a)(3) (noting substantial increase in cable penetration nationally and that the "cable television industry has become a dominant nationwide video medium"); H.R. Rep. No. 628, 102d Cong., 2d Sess. 42 (1992) (referring to share of all U.S. subscribers served by the largest cable operator).

[5]47 U.S.C. § 533(f)(2)(A),(B).

[6]47 U.S.C. § 533(f)(2)(D).

and scope that make possible the deployment of fiber optic cable and other advanced technologies, the development of local and regional cable programming, and the enhancement of customer service.[7] And as the Commission pointed out, regionalization may be critical to cable operators' ability to become competitors of local telephone companies.[8]

Nevertheless, while acknowledging the significant benefits of regional concentration, the Commission raises concerns about the harm that such concentration may have on the local advertising and programming marketplace as a possible justification for imposing limits. First, the legislative and administrative record to date is devoid of any evidence of anticompetitive behavior by cable operators vis-a-vis broadcasters or other video providers with regard to local advertising or local programming. Second, there is no reason to believe that regionally-concentrated cable systems possess the monopoly power now or in the near future to dominate local advertising or curtail programming output. In fact, all of the data shows that local and regional cable operators are still far behind local broadcasters in

---

[7]See e.g., Further Notice at ¶ 137. The benefits of regionalization are not mere promises. In Orlando, Florida, for example, Time Warner is presently deploying a digital interactive cable technology (the "Full Service Network") that links several communities together into a more efficient, integrated network offering a wide array of services.

CableLabs and a number of cable companies are currently developing the concept of "regional hubs," in which program storage, switching, and other capabilities are shared on a metropolitan or regional basis by different cable companies. This accelerates the introduction of new capabilities by allowing the sharing of expensive new headend equipment such as digital video libraries. Regional hubs also facilitate rapid introduction of technologies such as fiber optics, digital compression, customer addressability and interactivity. Moreover, a regional hub could serve as an access point to interconnect cable systems with other telecommunications networks.

[8]Further Notice at ¶ 137.

generating ad revenues.[9] And local broadcasters, which have 100 percent household penetration and a free government-granted license, are consistently able to outbid local cable systems for programming. Their financial leverage is only enhanced by the Act, which permits local stations to collect retransmission consent fees and guarantees them carriage on the basic service tier.

The upshot of all of this is that Congress intended for the horizontal ownership rules to be applied nationally. And even if there were no legal impediments to the adoption of regional ownership rules, the public benefits of clustering cable systems geographically far outweigh the purely speculative concerns about regional consolidation.[10] Therefore, the Commission should adhere to its intention to adopt only national subscriber limits.

B. Measurement And Percentage Limitation.

The Commission seeks comment on both the percentage limit that should be imposed on horizontal ownership and the measure used to implement this limit. With regard to the appropriate percentage limitation on horizontal ownership, the Commission states that the goal is to "set the limit high enough to preserve the benefits of horizontal concentration, while ensuring that cable operators cannot impede the flow of video programming."[11] As

---

[9]In 1991, local broadcast stations collectively generated $7.57 billion in advertising, compared to $420 million received by cable operators nationwide.

[10]Moreover, the Commission is right to be concerned that if it imposes regional limits, other multichannel video distributors may not be available to serve unserved subscribers in all communities. Regionalization creates efficiencies that enable cable operators to cost-effectively extend service to adjacent unserved areas. See 47 U.S.C. § 533(f)(2)(F) (subscriber limit rules adopted by Commission should not prevent cable operators from expanding service to "previously unserved rural areas").

[11]Further Notice at ¶ 148.

an initial matter, the Commission proposes to meet this goal with a 25 percent ownership cap on "homes passed" nationwide.[12] But it seeks further comment on the marketplace implications of a 25 to 35 percent subscriber limit.

NCTA continues to believe that a subscriber limit of 40 percent strikes the proper balance between the benefits and the potential harm of horizontal concentration.[13] Under the present market structure, there is no evidence that any existing MSO has the leverage to preclude the successful launch of a new programming service nor any indication that a more highly concentrated MSO could unilaterally do so in the future. Indeed, as NCTA and other cable commenters have pointed out, the historical record on this issue demonstrates that many programming services have not only obtained MSO carriage but have flourished in the marketplace with penetration levels well below 60 percent.[14] Applying traditional antitrust analysis, a single MSO would need to control over 50 percent of the market in order to exercise monopoly power.[15] Thus, we maintain that it is very unlikely that a cable

---

[12]The Commission's proposal also assumes that setting the threshold at 25 percent will prevent disruptive and dislocating divestitures of cable systems.

[13]See NCTA Comments in MM Docket No. 92-264 (filed February 9, 1993) at 15-18; NCTA Reply Comments in MM Docket No. 92-264 (filed May 12, 1993) at 4-6.

[14]For example, BET, Nostalgia, The Learning Channel, Bravo and other networks have succeeded with penetration levels of less than 30 to 40 percent. See Further Notice at ¶ 144 n.128. This reflects the varying factors and economic characteristics (i.e., advertising revenues, subscriber fees) that go into what penetration level is needed in order for a network to succeed.

[15]See Broadway Delivery Corp. v. United Parcel Service of America, Inc., 651 F.2d 122, 127 (2d Cir.), cert. denied, 454 U.S. 968 (1981); 2 E. Kintner, Federal Antitrust Law, § 12.6, at 352 (1980).

company reaching the 40 percent threshold could present a barrier to entry for new cable services or otherwise impede programming.

But if cable companies are required to freeze aggregate subscriber growth at 25 percent, there is evidence that this could stifle investments in new cable programming services.[16] Under such limitations, cable operators would be unable to achieve greater economies of scale that would promote the development of diverse new programming and the integration of advanced technologies. Existing programmers could be deprived of advertising revenues and subscriber fees needed to reinvest in better, more competitive programming alternatives. And, of course, consumers would be deprived of further efficiencies and other benefits that would emanate from some measure of increased concentration.

Despite the potential adverse effects of strict limits on horizontal growth, the Commission remains concerned about the ability of MSOs to exercise enhanced leverage through system consolidation above 25 percent. As mentioned above, antitrust principles and marketplace experience obviate this concern. Moreover, the risk of such anticompetitive abuse by larger MSOs is more than adequately addressed by other major provisions of the Act, including program access, leased access, and the regulation of cable carriage agreements. The program access provision, in particular, prohibits "unfair" conduct by cable operators that may restrict the availability of programming to other multichannel video programming distributors. The Commission's implementing rules prohibit discrimination

---

[16]See Comments of TCI in MM Docket No. 92-264 at 15-17, citing Besen, et al., "An Economic Analysis of the FCC's Proposed Cable Ownership Restrictions" (strict limits on horizontal ownership could diminish the quality, quantity and diversity of available programming); Comments of Discovery Communications in MM Docket No. 92-264 at 5-6.

among distributors with respect to price, terms and conditions in the sale or delivery of video programming (except in certain circumstances).[17] They also severely restrict vertically-integrated programmers from entering into exclusive contracts, and incorporate a strict attribution standard with no exceptions for single majority shareholders or non-voting limited partnership interests.[18]

Given these checks on anticompetitive behavior, national subscriber limits should merely serve as a safety net that protects against radical changes in the existing market structure. Therefore, the Commission should avoid imposing strict horizontal limits and, at a minimum, set the boundaries for the number of subscribers that can be served by one company in the 30 to 40 percent range.[19]

Finally, with regard to the methodology for measuring the limits, NCTA endorses a measurement based on the number of homes passed as opposed to the number of cable subscribers.[20] NCTA also supports the proposal to calculate compliance with the national

---

[17]47 C.F.R. § 63.54.

[18]Id.

[19]Additionally, NCTA supports the Commission's proposal to allow cable companies to exceed the subscriber limit ultimately adopted, provided the additional cable systems are minority-controlled. Increasing the number of minority-controlled media outlets will enhance the diversity of viewpoints, an important public policy objective.

[20]In the alternative, NCTA supports Time Warner's proposal to measure the subscriber limits by reference to a percentage that has (a) as its numerator, the number of cable subscribers served by the cable operator; and that has, (b) as its denominator, the sum of (i) the number of all cable subscribers nationally and (ii) the number of subscribers to other multi-channel video programming distributors. See Comments of Time Warner Entertainment Company in MM Docket No. 92-264 at 18-21.

subscriber limits by subtracting the number of homes passed by cable systems in areas where "effective competition" is established.

Where a system is subject to "effective competition," as defined by the Act, the marketplace ensures the unimpeded flow of programming from programmers to consumers and other distributors. Since the presence of a competing video distributor in the cable franchise area provides an outlet for new and unaffiliated programming services, the cable operator cannot restrain the availability of particular programming. Similarly, where a system is deemed subject to effective competition because fewer than 30 percent of the households subscribe, the system is highly unlikely to possess the market power to restrict the flow of diverse programming. Such systems should be accorded the same treatment under the subscriber limits as those facing another video competitor.

C. Horizontal Attribution Standard.

In the Further Notice, the Commission proposes to import the attribution criteria applied in the broadcast context to the cable ownership rules.[21] Under the broadcast attribution rules, ownership of 5 percent of a company's voting stock generally constitutes an attributable interest.[22] The Commission believes that a cable operator with such limited interest, like a broadcast licensee, could unduly influence programming decisions and thereby impede the flow of programming to consumers. NCTA still maintains that the broadcast attribution standard is inappropriate in this case.

---

[21] Further Notice at ¶ 156.

[22] See 47 C.F.R. § 73.3555 (Notes).

As NCTA pointed out in its initial comments, a 5 percent ownership interest in a cable system affords an investor neither the incentive nor the opportunity to exercise control or to unduly influence the system's dealings with programmers.[23] Moreover, applying such a low ownership threshold toward national subscriber limits will impede cable operator investment and the associated benefits of horizontal growth.

NCTA recognizes that something less than majority ownership may enable an entity to exert significant influence over the system. It is clear, however, that an attribution standard based on actual voting control or management control is a more meaningful measure of an entity's ability to control the flow of programming by virtue of its sheer size than a mere 5 percent ownership test. Furthermore, in addition to establishing a higher attribution standard than 5 percent, the Commission should adopt exceptions for single majority shareholder situations and for non-voting stock ownership to ensure that the rules effect only those entities responsible for the programming and related business decisions of the system.[24] Similarly, the Commission should consider applying a higher attribution standard, e.g., 20 percent, or prorating subscriber limits where more than one company holds an interest in the system in order to foster joint ventures and ensure that operators are not deterred from taking minority interests in a cable system.

---

[23]NCTA Comments at 19-21.

[24]As discussed with regard to the adoption of an attribution standard for the channel occupancy limits, infra, the Commission also should adopt insulation rules applicable to stock ownership as well as partnership.

D. Jurisdiction And Enforcement.

In the Further Notice, the Commission agrees with many commenters, including NCTA, that it is unnecessary and unduly burdensome to institute a formal certification process to enforce the subscriber limits.[25] It asks, however, whether cable operators currently reaching 20 percent or more of homes passed should be required to certify that they are in compliance with the limits. Alternatively, the Commission proposes to monitor and enforce subscriber limits through use of readily obtainable public information regarding cable system ownership.

NCTA maintains that under the present market structure there is no need to apply a certification process for any system transfers. As the Commission recognizes, only a few MSOs are anywhere near the proposed 25 percent threshold. And for purposes of monitoring future changes in cable system ownership, the Commission may rely on readily available industry publications, such as Paul Kagan Associates' annual Cable TV Financial Data. These publications are generally relied upon in the industry as sources of statistical information on subscribership according to homes passed and other indicia. This material is more than sufficient to keep track of cable companies approaching the threshold ultimately adopted.

With regard to waivers of the subscriber limits, NCTA reiterates its strong support for the Commission's proposal to consider such requests in cases involving de minimis violations or where an operator seeks to expand service into an unserved rural area. This type of flexibility will promote operator efforts to bring the efficiencies and other benefits of

---

[25]Further Notice at ¶ 164.

concentration to as many subscribers as appropriate. In particular, granting waivers for expansions into unserved rural areas is consistent with the Commission's statutory obligation to ensure that its rules do "not impose limitations which would bar cable operators from serving previously unserved rural areas."[26]

Finally, the Commission proposes to review the horizontal ownership limits every five years to determine whether such limits are reasonable under the prevailing market conditions. NCTA believes that a five-year review is appropriate given the dynamic and changing nature of the cable industry.

II. CHANNEL OCCUPANCY LIMITS.

A. Application Of Channel Occupancy Limits.

The Commission tentatively concluded in its initial Notice that channel occupancy limits should apply only to a cable operator's carriage of video programmers in which that particular operator has an attributable ownership interest, not to a cable operator's carriage of any vertically integrated program network.[27] In the Further Notice, the Commission has reaffirmed this tentative conclusion, finding it to be the "more reasoned approach" and the "logical interpretation" in light of the Congressional objectives at issue -- increasing diversity and protecting unaffiliated programmers from discrimination.[28]

NCTA, which supported the Commission's tentative conclusion in its initial comments, continues to agree that the channel occupancy limits should be applied only to a

---

[26]47 U.S.C. § 533(f)(2)(F).

[27]Notice, supra, 8 FCC Rcd at 220.

[28]Further Notice at ¶ 180.

cable operator's carriage of video programmers in which that particular operator has an attributable ownership interest. Cable operators have no incentive to favor programmers in which they have no ownership interest nor can they influence the content of the service. And as the Commission correctly states, applying channel occupancy limits to the carriage of all vertically-integrated programming services would severely inhibit MSO investment in new and existing programming services, thereby contradicting one of Congress' express statutory concerns.[29] Indeed, given the absence of any evidence that the mere fact of MSO investment leads unaffiliated operators to discriminate vis-a-vis independent programming services, the Commission's determination regarding the scope of the channel occupancy limits provision is entirely appropriate.

B. Calculation Of Channel Capacity/Effect Of Fiber Optic Cable And Digital Signal Compression.

The initial Notice raised the issue of whether channel occupancy limits should be based on all activated channels or whether broadcast, PEG, and leased access channels should be excluded.[30] In the Further Notice, the Commission has concluded that all activated channels, including those used for broadcast, PEG, and leased access services, should be taken into consideration in applying the channel occupancy limits.[31]

NCTA agrees with the Commission's conclusion regarding the inclusion of PEG, leased access, and broadcast channels in the channel occupancy limit calculation. As we indicated in our initial comments, the carriage of unaffiliated broadcast, PEG, and leased

[29] Id. at ¶ 182.

[30] Notice, supra, 8 FCC Rcd at 219.

[31] Further Notice at ¶¶ 189-90.

access channels is consistent with Congress' interest in enhancing diversity.[32] Moreover, reducing the base on which the channel occupancy limit is calculated by excluding certain types of channels will penalize those operators who offer a wide array of broadcast and access services by limiting their options in programming their remaining channels. Given that the must-carry and leased access requirements also take into account all activated channels, there can be no basis for questioning the appropriateness of applying this same approach to the channel occupancy limitation.

While the Commission has correctly determined that, for purposes of the channel occupancy limits, a system's channel capacity calculation should include PEG, leased access, and broadcast channels, NCTA is troubled by the Commission's almost off-hand statement that channels used for non-video service also should be counted. Section 11(c) of the 1992 Cable Act is concerned specifically with the carriage of affiliated video programming and does not authorize or intend for the Commission to address the carriage of non-video services.[33] Moreover, the application of the limits to channel capacity devoted to non-video information and communications services would severely impede on-going developments in this arena.[34]

---

[32]NCTA Comments at 29-30.

[33]See 47 U.S.C. § 533(f)(1)(B) (Commission directed to impose limits on number of channels that can be occupied "by a video programmer").

[34]For example, Time Warner recently announced plans, in partnership with US West, to deploy "Full Service Networks" offering a wide array of video and non-video telecommunications services in various parts of the country. The "Full Service Network" concept has been widely applauded as offering significant benefits to the public.

Finally, wholly apart from the question of whether PEG, leased access, and broadcast channels should be counted in applying the channel occupancy limits, the Commission has requested comment on a proposal by TCI to compute a system's channel occupancy limit on the basis of the system's bandwidth.[35] Elsewhere in the Further Notice, the Commission also has asked for comment on a related proposal by Viacom regarding the treatment of digitally compressed channels and on proposals to "cap" the channel capacity to which the channel occupancy limits apply.[36]

These various proposals to cap or otherwise limit the channels to which the channel occupancy limits apply reflect the fact that, within a few years, digital compression and other technological innovations are likely to make possible significant increases in the capacity of many cable systems.[37] While it is still too early to state with certainty how this new capacity will be provided as a technical matter or how it will be utilized, one possibility is that a large number of channels will be devoted to the delivery of individual programs

---

[35]Further Notice at ¶ 183.

[36]See id. at ¶¶ 226-27. The Commission also has asked for comment on a proposal by IFE to allow systems to carry affiliated programming in excess of the channel occupancy limits where no unaffiliated programmer is seeking carriage and channel capacity would otherwise go unused. Id. at ¶ 184. While this proposal deserves serious consideration, NCTA believes it is best addressed as an issue of enforcement. See discussion at pages 25-26, infra.

[37]Indeed, fiber and digital technology already are being utilized to provide expanded levels of service in some parts of the country. For example, Time Warner's "Quantum" service, currently available in parts of the New York area, offers 150 channels of programming.

essentially "on demand."[38] Balkanizing the provision of these "program-channels" through the imposition of vertical ownership limits simply makes no sense from a policy perspective and, indeed, could seriously impede the deployment of the technology needed to provide expanded service offerings.

Consequently, NCTA believes that proposals such as those put forward by TCI and Viacom have merit. We submit, however, that the simplest means of ensuring that operators continue to have the incentive and opportunity to expand their channel capacity is to cap the application of the channel occupancy limits above a certain level. NCTA has suggested 36 channels as an appropriate "cap," while others have proposed a 54 channel limit. Ultimately, the appropriate level will depend on such factors as the percentage limit placed on vertically integrated channel carriage and the attribution level adopted. In any event, the Commission should not delay the adoption of a "cap," but should establish one as part of this proceeding.[39]

C. Vertical Ownership Attribution Standard.

Defining when, for purposes of applying the channel occupancy limits, a cable operator will be deemed to have an attributable ownership interest in a video programmer is one of the most important questions presented in this proceeding. As NCTA pointed out in

---

[38]Another possibility is that systems will employ switched digital systems that will deliver, in effect, only one "channel" over which subscribers could choose to receive selections from a vast library of stored programming.

[39]If the Commission waits to establish a "cap" on the capacity to which the channel occupancy limits will apply, it is likely to slow the introduction of technologies capable of producing expanded service offerings. The end result may be to limit the development and availability of unaffiliated as well as affiliated program services.

its initial comments, the reasonableness of any particular percentage limit on the number of vertically integrated channels that a system may carry cannot be viewed in isolation from the attribution standard adopted.[40] Moreover, the interplay between the Act's channel occupancy and program access provisions could, depending on the attribution standards applied, result in a situation in which a cable operator is required to sell to other distributors networks in which the operator has invested but is not itself permitted to carry. Such a result would undermine the incentive for beneficial non-controlling cable operator investment in program networks.

Acknowledging these concerns, the Commission has stated in the Further Notice that, in the case of channel occupancy limits, "more flexible" attribution criteria are appropriate than have been deemed necessary in, for example, the program access context.[41] However, the broadcast attribution criteria (found at 47 C.F.R. § 73.3555) tentatively adopted by the Commission are not nearly flexible enough and will unduly restrict cable operator investment in program networks and the benefits associated therewith.

NCTA submits that in the context of applying channel occupancy limits, the Commission need not and should not go any further than an attribution standard based on actual voting or working control. A mere 5 percent ownership interest, which falls within the broadcast attribution standard, is not likely to give an investor either the opportunity or the incentive to restrict the availability of a network to competing distributors.[42] Such a

[40]NCTA Comments at 26.

[41]Further Notice at ¶ 198.

[42]NCTA Comments at 28-29.

non-controlling interest also is unlikely to give an investor the opportunity to influence programming content. Indeed, applying such a stringent attribution standard will frustrate the principal benefit provided by cable operator investment in program networks -- the spreading and sharing of risk.

The Commission's concerns regarding the ability of a non-controlling investor to influence programming decisions or to favor affiliated programmers over unaffiliated programmers are more than adequately addressed by the Act's program access, regulation of carriage agreements, and leased access provisions. Nonetheless, if the Commission is unwilling to employ a control-based attribution standard in determining an operator's compliance with the channel occupancy limits, it should at very least consider adopting certain modifications to the broadcast attribution criteria. For example, in order to ensure that operators are not deterred from taking minority positions in new cable networks as a risk sharing mechanism, the Commission should apply a higher attribution standard -- 20 percent -- where more than one operator holds an interest in the programmer. In addition, NCTA submits that the Commission should extend its insulation rules to cover interests other than limited partnerships, thereby permitting a cable operator whose ownership interest in a network exceeds the 5 percent limit (or otherwise is cognizable under the broadcast criteria) to certify that it is not involved directly or indirectly in the management of the network.

D. Percentage Limitation/Grandfathering Carriage Of Vertically Integrated Programmers.

Possibly the most vexing issue presented in this proceeding is the establishment of a specific percentage limit on the number of channels that a cable operator may program with affiliated networks. As NCTA emphasized in its initial comments, and as the FCC noted in the Further Notice, the designation of an appropriate percentage limitation for channel occupancy depends upon the attribution standard adopted, whether there are restrictions on the number (or type) of channels to which the limits apply, and other issues.[43]

The Commission has proposed a 40 percent limitation on the number of channels that an operator may program with affiliated networks.[44] NCTA believes a 40 percent limit is not inappropriate, but only if significant changes are made in the attribution standard, the overall number of channels to which the channel occupancy limit applies, and the treatment of pay-per-view services, as discussed in these comments. If the Commission is unwilling to make some or all of these various changes, NCTA submits that the percentage limitation should be set no lower than 50 percent. As NCTA and others established in their initial comments, a 50 percent (or greater) limitation finds significant support in antitrust theory and precedent.[45]

Regardless of the percentage limit settled upon, it is essential that the Commission adhere to its decision to grandfather existing levels of vertical programming carriage even

---

[43]Further Notice at ¶ 207 n.204; NCTA Comments at 26.

[44]Further Notice at ¶ 207.

[45]NCTA Reply Comments at 7; Liberty Media Corporation Comments at 22-23; TCI Comments at 34-35.

The Commission also has asked for comment on a proposal to allow expanded carriage of vertically integrated services (over the specified limit) where such services are minority-controlled or are targeted to a minority audience. Further Notice at ¶ 207. NCTA applauds this proposal as a means of promoting minority ownership and the development of diverse, minority-oriented programming. NCTA also agrees that adoption of the definition of "qualified minority programming source" in Section 612(i)(2) of the 1992 Cable Act, 47 U.S.C. § 532(i)(2), is appropriate for this purpose.

where they exceed the channel occupancy limits.[46] Nothing in the 1992 Cable Act or its legislative history suggests that Congress intended for current patterns of ownership and other market relationships to be upset by the implementation of Section 11.[47] Moreover, requiring divestiture or discontinuation of affiliation agreements will be enormously disruptive and will create subscriber confusion. Indeed, NCTA submits that the grandfathering provision should apply to existing carriage as of the date on which the Commission adopts its final rules in the proceeding, not merely as of December 4, 1992, as proposed in the Further Notice.[48]

E. Treatment Of Pay Channels, Multiplexed Channels And Local And Regional Networks.

The Further Notice proposes to exempt local and regional program networks from the channel occupancy limits.[49] NCTA supports this proposal. As the Commission has stated, an exemption for locally and regionally distributed programming will serve the Congressional goal of encouraging the local origination of programming.[50] Moreover, NCTA submits that the Commission should craft a broad definition of the services covered by a local/regional

---

[46]Further Notice at ¶ 236.

[47]See, e.g., 47 U.S.C. § 533(f)(2)(c) (directing the Commission "to take particular account of the market structure, ownership patterns, and other relationships in the cable television industry" in setting channel occupancy limits. See also Senate Report at 27 (rejecting imposition of stringent channel occupancy limit that could result in restructuring of cable industry).

[48]Section 613(f)(1), 47 U.S.C. § 533(f)(1), expressly gives the Commission until October 5, 1993 (one year after the date of enactment of the 1992 Cable Act) to establish channel occupancy limits.

[49]Further Notice at ¶ 219.

[50]Id., citing 1992 Cable Act, Section 2(a)(10).